Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-95

FRED DE GREGORIO,

Petitioner,

vs.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FRED DE GREGORIO,

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HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner petitions for a writ of certiorari to the judgment entered on the 18th day of June, 1979, in the United States Court of Appeals for the Second Circuit, affirming the judgment entered the 26th day of July, 1978 in the United States District Court for the Eastern District of New York (Pratt, J.), dismissing the petition herein for a federal writ of habeas corpus challenging the legality of petitioner's detention under color of a judgment of conviction entered on the 9th day of August, 1976 in Nassau County Court (Lawrence, J), sentencing petitioner to a term of three years on his plea of guilty to indictments pending

against him, Nassau County Court (Morrison, J.) having denied his past conviction motion, pursuant to Section 440.10 of the New York State Criminal Procedure Law, on the 21st day of February, 1978, to vacate the said judgment of conviction entered against petitioner, on grounds that the representation afforded him did not reach Sixth Amendment standards.

The opinion of the District Court for the Eastern District of New York, denying the petition for a writ of habeas corpus was not officially reported and is reproduced in Appendix A herein. The judgment of the United States Court of Appeals for the Second Circuit is reproduced in Appendix B herein. The opinion of the United States Court of Appeals for the Second Circuit was not officially reported and is reproduced in Appendix C herein.

JURISDICTION

The judgment of the Court of Appeals was entered on the 18th day of June, 1979. Jurisdiction of this Court to review the judgment of affirmance by certiorari, is conferred by 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Does the rule of the Second Circuit, which is not followed by any of the other circuit court, evaluating a charge of ineffective aid of counsel by determining whether such representation will offend Sixth Amendment standards only where it constitutes a sham and a mockery of justice that shocks the conscience of the court, meet constitutional standards?

STATEMENT OF FACTS

Petitioner was indicted by the Nassau County Grand Jury for the crimes of criminal usury and gambling. Prior to discovery on the making of any motions, petitioner retained Saul Roth, Esq. but shortly thereafter discharged him and John J. Sutter was retained. Sutter was put on notice by voluntary discovery that the evidence to obtain the indictment had been obtained by use of state court ordered electronic surveillance, which orders were renewed and amended from time to time. Nevertheless, Mr. Sutter, who made no pretrial motions on behalf of appellant, did not move, formally or informally, for discovery of the orders to seal the tape recordings, despite well defined New York State law, which prohibits the use of evidence obtained through electronic surveillance, unless the tapes have been sealed "immediately" after termination of the court ordered interception. Indeed, in *People v. Nicoletti,* 34 N.Y.2d 249 (1947), decided two years before appellant entered his plea of guilty, the New York Court of Appeals ruled that any delay of one week or upwards in sealing of tapes would be fatal to an indictment, without good cause being shown for such delay. Despite the pronouncement of *People v. Nicoletti* and notice that evidence had been gathered by court ordered electronic surveillance defense counsel still failed to move for discovery of the sealing orders, in order to determine whether a proper motion would lie to suppress the evidence against appellant.

Instead, Mr. Sutter advised petitioner to enter a plea of guilty and on May 25th, 1976, the plea was taken. On the 9th day of August, 1976, petitioner attempted to withdraw his plea, appearing with new counsel, but his application was denied. Instead, the court sentenced petitioner to a term of 1½ to 3 years. Petitioner did not take an appeal from the judgment of conviction.

Instead, petitioner moved Nassau County Court, pursuant to Section 440.10 of the New York Criminal Procedure Law to vacate the judgment of conviction against him, on grounds that he had been deprived of his Sixth Amendment right to effective aid of counsel, by reason of the latter's inertia in failing to seek discovery of the wiretap sealing orders, prior to advising petitioner to plead guilty.

During the course of the post conviction proceeding, the Nassau County District Attorney made known for the first time that there had been delay of from two weeks and upwards in sealing all of the tapes, which disclosure, as stated, was made by the district attorney for the first time during post conviction challenge to the conviction. Thus, for the first time, it appeared on record that the evidence against petitioner would have been suppressed and the indictments against him dismissed, had such disclosure been made prior to the entry of his plea of guilty. In his opposing papers in the state court proceeding, the district attorney conceded that he had not made known to the defense and defense counsel, John J. Sutter, a busy lawyer, enjoying an enviable practice, who just could not find the time to make the necessary motion to secure discovery of the sealing orders, that would have doomed the indictments against petitioner. Yet, on the other hand, the district attorney argued that petitioner had waived his right to challenge the legality of the proceedings by pleading guilty.

By order entered the 21st day of February, 1978, Nassau County Court Judge Henderson W. Morrison denied the motion without a hearing. He made findings that "the records do not indicate that the defendant or his attorneys made any pretrial application". The court also found that between plea and sentence, petitioner had indicated his dissatisfaction with John J. Sutter, by retaining new counsel, F. Courts Bouse, who was denied a continuance of the sentence proceedings in order to investigate petitioner's case.

The trial court wrestled with the problem, whether the representation afforded petitioner by John J. Sutter, who advised him to plead guilty, without taking the time, to investigate whether the wiretapping had been conducted in accordance with New York law. The court considered several factors including petitioner's prior criminal record, which the court felt, should have endowed him with a measure of sophistication in the management of his case and that a vacating of the judgment at this time would prejudice the state, by reason of the passage of five years since the investigation that lead to the indictments.

The court went on to analyze, without the benefit of a post conviction hearing, the efforts of Mr. Sutter:

> "There is no reason to assume that counsel was unaware of the potential infirmities of the People's evidence, either as a result of his own investigation, or as a result of pre-trial conferences with the prosecution. Indeed, before the defendant entered his plea, the District Attorney indicated that the reason for the generous plea offer was the People's recognition that some of the evidence available was questionable. The most that can be said, and that without assurance, is that defense counsel may have erred in not pressing more vigorously, on the record, for pre-trial disclosure. It cannot be said that any omission on the part of counsel was so glaring as to amount to a denial of the defendant's right to due process."

Petitioner exhausted his state remedies by an application to Associate Justice J. Irwin Shapiro of the Appellate Division, Second Department for leave to appeal to that court, which was denied. An appeal does not lie to the New York Court of

Appeal, where an associate justice of the Appellate Division, Second Department declines permission to appeal the denial of a motion made pursuant to Section 440.10, *supra,* to the Appellate Division.

In that posture, petitioner petitioned the United States District Court for the Eastern District of New York for a federal writ of habeas corpus, which was assigned to Hon. George C. Pratt.

The attorney general filed an affidavit in opposition, insincerely urging that petitioner should have raised the challenge to the legality of the sealing orders on a direct appeal from the conviction, without discussing how this could have been done when the district attorney never made known to the defense the content of the tapes and therefore, the trial court did not pass on the issue for review to lie.

The district court found that petitioner had duly exhausted his state remedies and that the constitutional issue was ripe for federal review. In respect to petitioner's claim that as a result of ineffective aid of counsel, the indictment had not been dismissed, Judge Pratt wrote:

> "Petitioner's motion to suppress might well have succeeded since it is now admitted by respondents here that the tapes had not been sealed immediately. See, e.g., *People v. Nicoletti,* 34 N.Y. 2d 249 (1974)."

However, Judge Pratt relied upon *Lipuma v. Commissioner,* 560 F.2d 84 (2nd Cir. 1977) to reach a conclusion that where the inefficiency of counsel deprives a state prisoner of a Fourth Amendment right, under those circumstances, federal courts will not afford a state prisoner habeas relief.

On the 18th day of June, 1979, the United States Court of Appeals for the Second Circuit affirmed the judgment of the Eastern District, reaching the constitutional issue, but ruling that the representation afforded by Sutter satisfied constitutional standards, since it did not constitute a sham or mockery of justice to shock the conscience of the court.

REASON FOR GRANTING THE WRIT

The Second Circuit rule that a conviction will not be set aside on a showing of ineffective aid of counsel, unless the representation by counsel made the trial a sham and a mockery of justice so as to shock the conscience of the court, is at odds with the standards for all other circuits and offends the Sixth Amendment.

Petitioner was indicted by the Nassau County Court Grand Jury on six separate indictments charging him with illegal possession of gambling equipment and criminal usury. He retained one Saul Roth, Esq. However, prior to discovery being afforded petitioner and before any motions were made, he discharged Roth and retained John Sutter to represent him. Sutter represented petitioner for a period of two years from April of 1974 up to the time that sentence was pronounced on August 9th, 1976. On occasion, lawyers in the employ of Sutter, such as Gino Pappa, Esq. would accompany petitioner to court, but his attorney remained John Sutter throughout. On the 25th day of May, 1976, on advice of Sutter, petitioner entered a plea of guilty to two of the indictments. Petitioner appeared for sentencing on the 9th day of August, 1976, with newly retained counsel, Martin Zevin, Esq. from the office of F. Courts Bouse, in an effort to withdraw his plea of guilty, which the court denied, sentencing him to a three year term. Neither Zevin nor Bouse had any opportunity to investigate petitioner's case and Roth had been substituted prior to any discovery or motions and so, had no participation in any of the pre-trial proceedings.

Thus, John Sutter, Esq. represented petitioner during the crucial stages of the case and so, was the attorney who had opportunity to investigate the case and interpose whatever defenses might be available to petitioner.

Prior to his advice to petitioner to enter a plea of guilty, the Nassau County District Attorney gave discovery to Sutter of copies of the orders of Nassau County Court authorizing electronic surveillance of petitioner's telephone. Sutter made no effort to request discovery of the sealing orders to determine whether they had been sealed "immediately" within the meaning of Section 700.50 of the New York Criminal Procedure Law, despite the fact that the New York Court of Appeals two years prior to petitioner's plea of guilty had held in *People v. Nicoletti,* 34 N.Y.2d 249 (1974), that an unexplained delay of as little as a week in sealing wiretapes pursuant to court order, will result in application of the exclusionary rule.

On May 25th, 1976, petitioner pleaded guilty. On August 9th, 1976, he was sentenced to concurrent three year terms. No appeal was taken. Nor was there any basis for appeal. The record did not include the orders directing the sealing of the wiretapes in the case, the only basis for a possible good faith appeal.

Following his incarceration, petitioner retained new counsel, who moved the sentencing court pursuant to Section 440.10 of the New York Criminal Procedure Law to vacate the judgment of conviction, on grounds that it was violative of his Sixth Amendment right to effective aid of counsel to recommend a plea of guilty, without first exploring the legality of wiretap sealing orders.

During the course of the post conviction proceeding, the Nassau County District Attorney made known for the first time that there had been delay of from two weeks and upwards in

sealing each of the tapes. Had such disclosure been made earlier, a motion to suppress the evidence and to dismiss the indictments would undoubtedly had succeeded.

Nevertheless, by order entered the 21st day of February, 1978, Nassau County Judge Henderson W. Morrison denied the motion without a hearing, writing that "the most that can be said, and that without assurance, is that defense counsel may have erred in not pressing more vigorously, on the record, for pre-trial disclosure." The court went on to write that "it cannot be said that any omission on the part of counsel was so glaring as to amount to a denial of the defendant's right to due process."

Petitioner exhausted his state remedies, when an associate justice of the Appellate Division, Second Department denied him leave to appeal to that court from the denial of his post-conviction motion.

Petitioner's motion for a federal writ of habeas corpus was denied, despite the following finding by United States District Court Judge George C. Pratt:

> "Petitioner's motion to suppress might well have succeeded since it is now admitted by respondents here that the tapes had not been sealed immediately. See, e.g., *People v. Nicoletti,* 34 N.Y.2d 249 (1974)."

A certificate of probable cause was issued by the United States Court of Appeals for the Second Circuit, granting petitioner leave to appeal to that court from the judgment dismissing his petition. However, that court affirmed the judgment below, holding that the representation by Sutter met constitutional standards since it did not constitute a sham and a mockery of justice.

It is patently and abundantly clear that John Sutter did not request discovery of the sealing orders for the simple reason that he did not take the time to think about their possible importance. No strategy was served by his failure to even request to examine them.

In 1949, the United States Court of Appeals for the Second Circuit set up a standard for evaluating Sixth Amendment claims for ineffective aid of counsel, that shows little respect for the degree of competency necessary to meet Sixth Amendment requirements and is certainly out of tune with modern constitutional interpretation. *Gideon v. Wainwright,* 372 U.S. 335 (1963). Thus, the court wrote in *United States v. Wight,* 176 F.2d 376 (2nd Cir. 1949):

> ". . .unless the purported representation by counsel was such as to make the trial a farce and a mockery of injustice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. . .
>
> A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

Where counsel failed to prepare by interviewing the key witness at a trial, the Second Circuit nevertheless found that such omission did not constitute a "farce and a mockery of justice" and let a state conviction stand. *United States ex rel.Crispin v. Mancusi,* 448 F.2d 233 (2nd Cir. 1971). In short, the Second Circuit has found that the failure of counsel to prepare for trial in a criminal case does not shock the conscience of the court, and therefore does not call for federal habeas relief.

It is most significant that the Fourth Circuit, under similar circumstances found that the failure to interview and investigate witnesses in a rape case, calls for a federal writ of habeas corpus relief. The court in *Coles v. Peyton,* 389 F.2d 224 (4th Cir. 1968), defined the duties of counsel in a criminal case in positive language, rather than the negative plaudits used by the Second Circuit:

> "Counsel must conduct appropriate investigations, both factual and legal, to determine if a matter of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." (at p. 227).

The Fifth Circuit, in *Rummels v. Estelle,* 590 F.2d 103 (5th Cir. 1979) has likewise held that counsel has "a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings and laws involved." Sutter did nothing but recommend a plea of guilty to an indictment that he did not even take the time out to learn whether it had been legally obtained, in accordance with New York case law.

Indeed, it would seem that the Second Circuit would withhold relief on a claim of ineffective aid of counsel, unless it could be shown that counsel came to court daily in a state of intoxication, singing barroom ballads, for only then could it be truly said that his representation constituted a "sham and a mockery of justice."

There are times that moving to suppress evidence will serve strategy, as where the likelihood of success on the motion is

remote and the risk of a denial of such motion can result in a harmful instruction to the jury that the evidence has been judicially found to have been obtained legally. Thus, in *Coco v. United States*, 569 F.2d 367 (5th Cir. 1978), the Fifth Circuit wrote:

> "Not moving for suppression is a common trial tactic. The substantial risk of an instruction from the court that the tape was lawfully obtained might be thought to outweigh the jurors speculation that this was an unlawful intrusion and any individual prejudices against an interception which lacks judicial sanction. Many lawyers prefer innuendo to inflection, particularly in areas of supposed sensitivity on the the part of jurors. We cannot say that Mr. Ragano's desire to avoid prejudicing his client in any way violated Coco's constitutional rights."

In the case at bar, however, no strategy was served by Sutter's inactivity, since his inertia had not reached the stage of challenge to the evidence, but rather stopped short of seeking discovery. No case has been found, despite search, where a court has found that counsel's election to bury his head in the sand and not try to learn about his client's case will serve strategy.

Indeed, this Court had employed language in *Tollett v. Henderson*, 411 U.S. 1602 (1973), that would seem to be at odds with the standards for testing effective aid of counsel adhered to by the Second Circuit:

> "If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases . . . . Counsel's failure to evaluate properly facts giving rise to a Constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof."

Had Mr. Sutter made a simple motion for discovery of the sealing orders in the case at bar, and realized that the two weeks and upwards delay in sealing was in violation of the rigid New York State law, the evidence against petitioner would have surely been suppressed on a motion and there would have been no need for a plea of guilty. *People v. Nicoletti*, 34 N.Y. 2d 249 (1974); *People v. Sher*, 38 N.Y. 2d 600 (1975); *People v. Scaccia*, 55 A.D. 2d 444 (4th Cir. 1977); *People v. Pecoraro*, 58 A.D. 2d 462 (2nd Dept. 1977).

What counsel failed to do in the case at bar was to properly investigate petitioner's case to determine whether any defenses might succeed in meeting it. Whether his representation constituted "a sham and a mockery of justice" should not have been the shibboleth on which to evaluate his representation. In *Scott v. United States*, 427 F.2d 609 (D.C. 1970), the District of Columbia Circuit wrote that the "farce and mockery of justice . . . standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness." In a later case, *United States v. DeCoster*, 487 F.2d 1197 (D.C. 1973), the District of Columbia wrote that "when counsel's choices are uniformed because of inadequate preparation, a defendant is denied the effective assistance of counsel . . . the 'farce and mockery' language was 'not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness' " The Second Circuit, in contrast to the others, has applied the "sham" language literally, thereby creating a nebulous barrier for the preservation of convictions caused by incompetent counsel, to the constitutional detriment of their clients, a standard which should be resoundedly criticized and struck down.

CONCLUSION

The writ of certiorari should be granted in order to accomplish uniformity among the circuits in the standard to be applied for adjudicating claims of ineffective aid of counsel in the Sixth Amendment sense. The Second Circuit stands alone in its harsh burden imposed upon a prisoner, who has been inadequately represented, to prove not only ineffectiveness of such counsel, but that his representation constituted a sham and a mockery of justice that shocks the conscience of the court. Thus, in cases such as petitioner's, where counsel has failed to investigate the case and prepare and interpose an available defense, the Second Circuit has declined to provide relief.

Uniformity is a goal to be attained among the various circuit courts and it is submitted that certiorari should be granted in the case at bar to achieve such unity, where the Second Circuit stands alone on so important and basic a constitutional issue.

Respectfully submitted,

JOSEPH A. FARALDO
Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRED DE GREGORIO,

Petitioner,

-against-

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

Docket No. 78 C 1154

PRATT, J:

Petitioner in this habeas corpus action, brought pursuant to 28 USC §2254, is currently incarcerated in the Attica Correctional Facility, serving a term of imprisonment of from 1½ to 3 years upon a judgment of conviction as a prior felony offender, entered on August 9, 1976 in the County Court, Nassau County, following a plea of guilty to the crimes of promoting gambling in the first degree and criminal usury.

In March of 1975, pursuant to §700 *et seq.* of the New York Criminal Procedure Law, and on application of the Nassau County District Attorney, an order issued from the Nassau County Court authorizing electronic surveillance of the petitioner based on information from an unnamed informer.

This properly authorized surveillance provided information which then justified issuance of a search warrant. Under the warrant, evidence was seized that was ultimately used to obtain six indictments against petitioner, containing 12 felony and 3 misdemeanor counts. After extensive plea negotiations, petitioner pleaded guilty to two felony counts in full satisfaction of the six separate indictments and all counts contained therein.

Although no direct appeal was taken from the judgment of conviction, petitioner did move to vacate the judgment in the County Court pursuant to NYCPL §440.10. There, as here, petitioner alleged that he had been deprived of his constitutional right to effective aid of counsel. By order entered on February 21, 1978, petitioner's motion was denied, and his subsequent application pursuant to NYCPL §460.15 for leave to appeal was also denied. His state remedies having thus been exhausted, petitioner's habeas corpus claim is properly before this court. 28 USC §2254(b)(c).

Petitioner alleged that he was denied his sixth amendment right to effective assistance of counsel because his attorney failed to make pretrial motions for discovery of the dates of the termination of electronic surveillance and sealing of the tapes, and consequently, failed to move to suppress the evidence against the petitioner. NYCPL §700.50 requires that tapes of authorized surveillance be made available to the issuing justice "immediately" for sealing. Petitioner's motion to suppress might well have succeeded since it is now admitted by respondents here that the tapes had not been sealed immediately. See *e.g., People v. Nicoletti,* 34 NY2d 249 (1974).

To support his contention that his counsel's failure to move for a suppression hearing constitutes a sixth amendment violation sufficient to entitle him to release from custody on federal habeas corpus, petitioner relies upon the decision in

United States ex rel. Rosner v. Commissioner of the New York Department of Corrections, 421 F Supp 781 (SDNY 1976). His reliance is misplaced. In *Rosner* there was a trial at which the challenged evidence was admitted; here, petitioner's guilty plea made a trial unnecessary. Moreover, *Rosner* was reversed on appeal in *LiPuma v. Commissioner, Department of Corrections, State of New York,* 560 F2d 84 (CA2 1977), on the authority of *Stone v. Powell,* 428 US 465 (1976), in which the Supreme Court ruled that fourth amendment claims are not subject to habeas corpus review unless petitioner can show that he was denied an opportunity to fully and fairly litigate his claims in the state courts. *LiPuma* held that when an alleged fourth amendment violation lies at the heart of the case, a claim "ostensibly grounded on the sixth rather than the fourth, amendment does not negate *Stone's* applicability", *LiPuma, supra,* at 93 n.6.

Although, as in *LiPuma,* the "heart" of this case is a fourth amendment claim that the evidence obtained from surveillance should have been suppressed, it is unnecessary to reach *Stone's* "full and fair opportunity" analysis here, because a guilty plea was entered. As Judge Morrison pointed out in his Nassau County court decision denying the state court motion to vacate the sentence, a plea of guilty provides only a "scanty" record:

> [T]he reviewing court is not privy to the hours of negotiation between the People and the defense counsel. Nor is it a party to the conferences between defense counsel and the defendant. Further, the Court cannot know how the defendant weighs the uncertainties of trial against the bargain offered by the People. *People v. DeGregorio,* County Court, Nassau County, 2/21/78 at 9.

It is difficult to assess the fairness of the process on such a record. Yet Judge Morrison also noted that plaintiff's plea was voluntary and knowing, and that through it plaintiff "waives certain rights and evinces, *prima facie,* an intention to forego appellate review of his conviction." *DeGregorio, supra,* at 7. See *People v. Melton,* 35 NY2d 327 (1974). The plea negotiation process here was extensive, involving 11 pretrial conferences conducted by experienced attorneys of the defendants' own chosing and resulting in a significant reduction in penal sanctions. In such a situation at least, a defendant should not be heard to complain that because the final bargain was made before other possible proceedings were undertaken, he was denied effective assistance of counsel.

Had the suppression hearing been demanded and lost, defendant's plea bargaining power might well have been greatly reduced. Considering the array of serious charges as well as petitioner's past record, his counsel appears to have succeeded in obtaining a fairly light sentence.

Clearly, petitioner's claim of a sixth amendment violation fails to meet the stringent standards the Second Circuit has established for claims of ineffective assistance of counsel. Even if petitioner's counsel may now be thought to have "erred" in not moving for suppression of evidence, "errorless counsel is not required". *United States v. Gargiulo,* 324 F2d 795, 796 (CA2 1963). Nor did conduct of petitioner's counsel make the proceedings up to and including the guilty plea a "farce and a mockery of justice". *United States v. Wight,* 176 F2d 376 (CA2 1949). See also, *Curci v. United States,* No. 77-6147 (CA2 1978); *Rickenbacker v. Warden,* 550 F2d 62 (CA2 1976).

Accordingly, petitioner's application for a writ of habeas corpus is denied and the petition is dismissed.

SO ORDERED.

Dated: Westbury, New York
July 26, 1978.

s/ George C. Pratt
GEORGE C. PRATT
U.S. DISTRICT JUDGE

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of June one thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN

HON. WILFRED FEINBERG

HON. WILLIAM H. TIMBERS

Circuit Judges,

FRED DE GREGORIO,

Petitioner-Appellant,

v.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent-Appellee.

79-2062

Appeal from the United States District Court for the Eastern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

s/ Arthur Heller
Arthur Heller
Deputy Clerk

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Decision rendered by the United States Court of Appeals for the Second Circuit has not yet been typed and will be forwarded to this Court when received.

Supreme Court, U. S.
FILED
AUG 20 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 79-95

FRED DE GREGORIO,

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vs.

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRED DE GREGORIO,

Petitioner-Appellant,

v.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent-Appellee.

Docket No. 79-2062

Before:

HON. STERRY R. WATERMAN, WILFRED FEINBERG, and WILLIAM H. TIMBERS, *Circuit Judges.*

New York, June 18, 1979

Statement made by the court at disposition of appeal in open court.

JUDGE FEINBERG:

You understand that when we dispose of a case in open court we do so under our local rule because we think the issues are clear and can only be decided one way and it is no reflection on the quality of the advocacy. This is an appeal from an order

of the United States District Court for the Eastern District of New York, by Judge Pratt, who was the Judge, which denied appellant's application for a writ of habeas corpus. Appellant had pleaded guilty in the State court to two felony counts charging promoting gambling and usury in violation of New York State law in full satisfaction of six different indictments charging a total of 12 felonies and three misdemeanors. He received a one and a half to three years sentence. He was released from state custody on parole in August, 1978.

Appellant claimed before us on this appeal that he was denied effective assistance of counsel because his lawyer failed to bring a suppression motion to challenge evidence seized pursuant to a search warrant — the probable cause for which was taped conversations made under a state wiretap order. Apparently there was a delay in sealing the tapes which appellant asserts barred use of the tapes for any purpose under the state law, and purpose, thereby vitiating the probable cause for the search warrant. Appellant claims that without the evidence seized pursuant to the search warrant the indictments would have had to be dismissed for insufficient evidence.

We conclude that there was no error by the District Judge in denying appellant's application for a writ of habeas corpus without holding a hearing. Appellant simply was not denied effective assistance of counsel. First, appellant apparently claims only one of his lawyers was ineffective, yet appellant was represented by several lawyers, as many as five at different times, none of whom made the suppression motion that appellant argues should have been made. Second, while it is true as Judge Pratt pointed out in his opinion that a motion to suppress might have succeeded, it is far from obvious that it would have succeeded certainly. The State may have been able to justify the delay in sealing the tapes, and even if the tapes were rendered inadmissible as evidence in chief by reason of the delay it may be that under state law they could still be used to establish probable cause for the search warrant. Compare, for example, a case in

this Court, *United States v. Fury*, 554 F.2d 522 at page 532. The decision not to make a suppression motion, therefore, may have been a tactical one. If the motion were made and lost appellant's bargaining power in the plea negotiations would have been substantially undercut. As it was appellant's counsel made what appears to be a very good plea bargain for appellant. Many major charges were dropped. Considering appellant's status as a second felony offender, the sentence he received was light. We think it is clear that on the issue before us appellant was adequately represented and that the proceedings were so far from a farce or mockery of justice that no hearing is required.

We therefore affirm the judgment of the District Court.

Thank you, Gentlemen.

Supreme Court, U. S.
FILED
AUG 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-95

FRED DEGREGORIO,

Petitioner,

against

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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OCTOBER TERM, 1979

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FRED DEGREGORIO,

Petitioner,

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HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Opinion Below

Neither the opinion of the Court of Appeals for the Second Circuit nor the opinion of the District Court for the Eastern District of New York has been reported. The opinion of the District Court has been submitted to this Court by petitioner. The Circuit Court opinion is attached hereto.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.*

Question Presented

Did the Court of Appeals for the Second Circuit correctly hold that petitioner was adequately represented by counsel at his state court trial where his attorney, an experienced trial lawyer and one of five retained counsel during the state court proceeding, through numerous pretrial conferences, succeeded in securing an excellent disposition for petitioner in recommending that petitioner plead guilty.

Facts

Beginning on May 17, 1973 a Nassau County Grand Jury filed six indictments against petitioner. By January 29, 1975, petitioner had been charged with twelve Class E Felonies and three Class A Misdemeanors (2a).** Petitioner, represented by retained counsel, Saul Roth, pled guilty at his first arraignment on June 5, 1973 to Possession of Gambling Records, First Degree. On each subsequent arraignment date petitioner entered a plea of guilty. In April of 1974 petitioner retained new counsel, John Sutter. Mr. Roth was relieved as counsel on May 8, 1974 (3a).

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* 28 U.S.C. § 1257 is inapplicable to the case at bar as that section applies to review of judgments of the highest court of a state. 28 U.S.C. § 1254(1) may, however, provide the jurisdictional predicate for the instant petition.

** Numerical references succeeded by "a" refer to Respondent's Appendix in this Court, attached hereto.

During the next three years, following the filing of the original indictments, at least eleven pretrial conferences were held at which extensive plea negotiations took place (3a). On May 25, 1976 petitioner appeared before Hon. Paul S. Lawrence, Acting County Court Judge. The District Attorney informed the Court that petitioner wished to change his plea of not guilty to guilty to Promoting Gambling, First Degree and to Criminal Usury (3a). The District Attorney urged acceptance of the plea because petitioner was facing a mandatory prison term and was pleading to the top count in the indictment. All extant counts (10 felonies and three misdemeanors, 3a) were to be dismissed if the Court accepted the plea. The People further urged acceptance of the plea to save the time and expense of a trial and because the People recognized that "some of the evidence available was questionable" (10a). Petitioner was represented at the time of the entry of his plea of guilty by two retained counsel (7a).

The trial judge ascertained at the plea hearing that petitioner was knowingly and voluntarily waiving certain constitutional rights. The Court further informed petitioner that if upon reading the Probation Report he could not give the petitioner the agreed sentence of one and a half to three years, he would permit withdrawal of the plea (4a).

Petitioner appeared at sentencing on August 9, 1976 with two additional retained counsel, Marvin Zevin and F. Courts Bouse (4a). Mr. Bouse stated that the plea arrangements were "good" from the petitioner's point of view. Nevertheless, he would like an adjournment to review the file in light of petitioner's medical condition (4a-5a). None of his counsel nor petitioner questioned the voluntariness of the plea nor did they suggest that petitioner was innocent (7a). No formal request to withdraw the plea was made. Sentence was imposed consistent with the terms negotiated by petitioner, his counsel and the District Attorney (5a).

Petitioner failed to perfect an appeal from this conviction although a notice of appeal was filed (P. 2a).* Failure to appeal cannot be attributed to the counsel (Mr. Sutter) whose ineffective assistance has been asserted on the instant petition for a writ of habeas corpus as that counsel had been replaced prior to the expiration of the time to perfect an appeal.

After the time to appeal had expired, petitioner commenced an action in state court pursuant to Criminal Procedure Law § 440.10 seeking to vacate the judgment of conviction on the grounds of ineffective assistance of counsel and that the sentencing court had erred in denying a request for an adjournment (1a). Following a review of the facts of the criminal proceeding (1a-4a), the Hon. Henderson W. Morrison, County Court Judge, denied the motion. The Court found that:

> "1. The defendant was not untutored in the proceedings resulting in his incarceration, having been involved in plea bargaining arrangements on at least five previous occasions.
>
> "2. There is no claim that the defendant was relegated to overburdened assigned counsel not of his selection. The defendant has retained four attorneys to date in this matter.
>
> "3. Counsel advising the defendant when the plea was entered was experienced in criminal matters and familiar with the proceedings here.
>
> "4. At the time the defendant entered his plea of guilty, he responded to questions from the bench indicating that he was satisfied with the plea bargain negotiated and with his attorney's efforts on his behalf.

* Citations to the appendix preceded by "P" refer to petitioner's appendix in this Court.

> "5. Trial counsel spent some three years and was involved in at least eleven conferences of record prior to agreeing to this disposition.
>
> "6. The disposition significantly reduced the defendant's exposure to penal sanctions.
>
> "7. The defendant reecived less than the maximum sentence (P. L. 70.06).
>
> "8. Neither the defendant nor any of his attorneys have ever suggested that the defendant was, in fact, innocent.
>
> "9. The People would be seriously prejudiced if forced now to try these indictments after the passage of almost five years since the investigation." (9a-10a)

The Court recognized trial counsel's apparent failure to challenge the legality, under state law, of the People's evidence obtained by electronic surveillance but weighed against that the District Attorney's generous plea offer, induced in part by the People's recognition that some of the evidence was possibly subject to a motion to suppress (10a). Leave to appeal from the denial of petitioner's motion to the Appellate Division, Second Department was denied by Associate Judge J. Irwin Shapiro (P. 2a).

The District Court Opinion

In his application for federal habeas corpus relief petitioner attacked his conviction by order to show cause dated June 6, 1978 on the ground that his Sixth Amendment right to effective assistance of counsel was violated in that trial counsel failed to move to suppress evidence against him derived from electronic surveillance (P. 2a). The application was denied on July 26, 1978 (P. 5a).

In the District Court, petitioner relied on *United States ex rel. Rosner* v. *Commissioner of the New York Department of Correction*, 421 F. Supp. 781 (S.D.N.Y. 1976). The District Court (*Pratt*, D.J.) observed that *Rosner, supra* had been reversed on appeal in *LiPuma* v. *Commissioner, Department of Correction, State of New York*, 560 F. 2d 84 (2d Cir. 1977). The District Court did not, however, rely upon *LiPuma, supra* or *Stone* v. *Powell*, 428 U.S. 465 (1976) upon which *LiPuma, supra* was based. The Court found instead:

> "Although as in *LiPuma*, the 'heart' of this case is a fourth amendment claim that the evidence obtained from surveillance should have been suppressed, it is unnecessary to reach *Stone's* 'full and fair opportunity' analysis here because a guilty plea was entered." (P. 3a)

In finding that petitioner's Sixth Amendment claim failed to meet the standard established by the Second Circuit for allegations of ineffective assistance of counsel, the District Court concluded:

> "Had the suppression hearing been demanded and lost, defendant's plea bargaining power might well have been greatly reduced. Considering the array of serious charges as well as petitioner's past record, his counsel appears to have succeeded in obtaining a fairly light sentence." (P. 4a)

On August 24, 1978 Judge Pratt denied a request for a certificate of probable cause. Petitioner's counsel had requested the certificate to raise the issue of the applicability of *Stone* v. *Powell, supra* to the situation where a Sixth Amendment violation is asserted. In denying the motion, the Court stated:

> "Since the *Stone* v. *Powell* issue was never decided by the court, it may not be raised on appeal."

The Opinion of the Court of Appeals

On June 18, 1979, the Court of Appeals for the Second Circuit affirmed the decision of the District Court in a unanimous decision rendered from the bench following oral argument. The Circuit concluded that petitioner "simply was not denied effective assistance of counsel" (14a). Petitioner was represented by as many as five lawyers none of whom saw fit to make the suppression motion urged, and a suppression motion would not have "succeeded certainly." The Circuit went on to say:

> "The decision not to make a suppression motion, therefore, may have been a tactical one. If the motion were made and lost appellant's bargaining power in the plea negotiations would have been substantially undercut." (15a)

The Court concluded that counsel made a good bargain for petitioner and that petitioner was adequately represented:

> ". . . the proceedings were so far from a farce or mockery of justice that no hearing is required." (15a)

REASON FOR DENYING CERTIORARI

In that the court below correctly held that petitioner's counsel provided adequate representation which would satisfy any of the recognized standards, the question of what standard should be applied in evaluating claims of ineffective assistance of counsel was not implicated in the decision.

Petitioner challenges the "farce or mockery of justice" standard used by the Second Circuit in evaluating the adequacy of representation by counsel. However, in denying the application for a writ of habeas corpus, and in unanimously affirming the opinion of the District Court, the Second Circuit Court of Appeals held that petitioner was adequately represented by all of the recognized standards,

and the question sought to be reviewed herein was surplusage.

Petitioner, a prior felony offender (3a), was facing indictments containing 12 Class E felonies and 3 Class A misdemeanors (2a). Plea negotiations took place over a number of years and included at least eleven pre-trial conferences (3a). Petitioner's counsel, whose adequacy is challenged herein, was able to secure an agreement whereby petitioner pled guilty to 2 felony charges. All other charges were dropped (3a). Petitioner was sentenced to a term of 1½ to 3 years.* Considering the array of charges against him (and the fact that he was sentenced as a second felony offender), petitioner's sentence is light. Not only did petitioner's counsel not render ineffective assistance, but rather, under the circumstances, his representation was more than adequate.

Petitioner with the benefit of counsel made an excellent bargain. As the District Court observed:

> "In such a situation at least, a defendant should not be heard to complain that because the final bargain was made before other possible proceedings were undertaken, he was denied effective assistance of counsel.
> "Had the suppression hearing been demanded and lost, defendant's plea bargaining power might well have been greatly reduced. Considering the array of serious charges as well as petitioner's past record, his counsel appears to have succeeded in obtaining a fairly light sentence." (P. 4a)

Underlying petitioner's argument is the assertion that "a motion to suppress the evidence and to dismiss the indictments would undoubtedly had [sic] succeeded." (Petitioner's petition for certiorari, p. 9). Petitioner's claim, however, is based upon a series of conjectures.

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* Petitioner was released on parole on August 4, 1978.

". . . [D]iscovery *might* have resulted in information which *might* have led to a successful motion to suppress the introduction of illegally obtained evidence which *might* have resulted in the dismissal of the indictments against the defendant." (6a) (Emphasis in original). The District Court, however, merely stated that "Petitioner's motion to suppress might well have succeeded." (P. 2a). Even if the tapes were suppressed, it does not follow that the indictment would have been dismissed. There was, at least, an unnamed informer who provided the information which secured the order permitting the electronic surveillance (P. 1a). The Second Circuit observed that even if a suppression motion had succeeded, rendering the tapes inadmissible as evidence in chief, they could still be used to establish probable cause for a search warrant (15a). It must be noted that in *all* the cases cited by petitioner for the proposition that the tapes would have been suppressed the People were permitted to offer a "satisfactory explanation" for the delay in sealing. The state had no such opportunity in the case at bar because petitioner chose to forego direct appeal as well as a suppression motion.* In addition, a delay approximating the two week delay in the instant case has been excused due to a satisfactory explanation. *United States* v. *Skiaroff*, 506 F. 2d 837, 840 (5th Cir. 1975) (14 day delay); *United States* v. *Poeta*, 455 F. 2d 117, 122 (2d Cir. 1972), *cert. denied* 406 U.S. 948 (1973) (13 day delay).

Petitioner's trial counsel's representation indicates a strategic choice to obtain the best possible results. The court below stated:

> "If the motion were made and lost, appellant's bargaining power in the plea negotiations would have been substantially undercut." (15a)

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* This tactic must be attributed to at least three separately retained counsel.

Counsel's strategy appears to have been effective as petitioner received a light sentence (15a). An appellate court ought not question the particular strategy employed by counsel, particularly where that strategy is effective. See *United States ex rel. Walker* v. *Henderson,* 492 F. 2d 1311 (2d Cir.), *cert. denied* 417 U.S. 972 (1974); *United States* v. *Yanishefsky,* 500 F. 2d 1327 (2d Cir. 1974); *United States* v. *Matalon,* 445 F. 2d 1215 (2d Cir.), *cert. denied* 404 U.S. 853 (1971).

Petitioner voluntarily pled guilty upon advice of counsel. Rather than being the victim of ineffective assistance of counsel, petitioner received commendable assistance. As stated by the Supreme Court in *Tollett* v. *Henderson,* 411 U.S. 258, 268 (1973):

> "Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law . . . A prospect of plea bargaining, the expectation or hope of a lesser sentence, of the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement . . . might be factually supported."

It should be noted that petitioner was represented, in succession by Saul Roth (3a), John Sutter (3a), Gino Pappa, Marvin Zevin (4a) and F. Courts Bouse (4a), all retained counsel. Apparently, petitioner is asserting that Mr. Sutter alone rendered ineffective assistance of counsel (petitioner's petition for certiorari, p. 8). In order to grant the writ it would be necessary to find all counsel ineffective as no motions were made by counsel who preceded Mr. Sutter and no direct appeal was taken by counsel subsequent to Mr. Sutter. Apparently, all counsel concurred in the strategy adopted, a strategy which was eminently successful.

Not only were the proceedings in this case not a "farce or a mockery of justice", but rather counsel provided excellent representation which resulted in the petitioner's receiving a light sentence. In that the standard applied to cases asserting ineffective assistance of counsel by the Second Circuit was not implicated in the decision, as counsel's assistance was more than adequate to meet any standard, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 7, 1979

Respectfully submitted,

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APPENDIX A

Opinion of the County Court—Nassau County.

COUNTY COURT—NASSAU COUNTY
Present: HON. HENDERSON W. MORRISON, County Judge.

Motion Cal. #C-1140

Indictment #37384, 37751, 38260, 41290, 41415 & 41658

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PEOPLE OF THE STATE OF NEW YORK

—against—

FRED DE GREGORIO,

Defendant

By this motion, the defendant seeks an order of this Court vacating a previously entered judgment of conviction, pursuant to Criminal Procedure Law § 440.10. The defendant's counsel advances two related arguments in support of this motion. First, the defendant alleges that he was denied the effective assistance of counsel during the proceedings which resulted in his conviction. Second,

he argues that the trial court erred in denying his request, advanced at time of sentence, to adjourn the proceedings so that newly retained counsel could familiarize himself with the defendant's case and determine the advisability of withdrawing the guilty plea entered by the defendant.

The People strenuously oppose the defendant's motion.

The defendant attracted the attention of Nassau County law enforcement officials sometime in 1973. The defendant, who already had some familiarity with the practices of the criminal courts and correctional facilities of this State, was the subject of electronic surveillance authorized by an order of this Court. As a result of evidence obtained from that surveillance and a subsequent search warrant, a Nassau County Grand Jury filed six indictments charging the defendant with the following crimes.

Indictment	*Date*	*Charge*
37384	5/17/73	Possession of Gambling Records First Degree P.L. § 225.20, Class E Felony
37751	6/28/73	(4 counts) Criminal Usury, P.L. § 190.40, Class E Felony Possession of Usurious Loan Records, P.L. 190.45, A Misdemeanor
38260	9/12/73	Possession of Gambling Records First Degree P.L. § 255.20, Class E Felony Promoting Gambling Second Degree, P.L. § 225.20, A Misdemeanor Conspiracy in the Third Degree, P.L. § 105.05, A Misdemeanor
41290	12/16/74	Criminal Usury, P.L. § 190.40, Class E Felony
41415	1/ 2/75	(4 counts) Criminal Usury, P.L. § 190.40, Class E Felony
41658	1/29/75	Criminal Usury, P.L. § 190.40, Class E Felony

The defendant had thus been charged, by January 29, 1975, with twelve Class E felonies and 3 Class A Misdemeanors.

The defendant's first arraignment, on Indictment #37384, took place on June 5, 1973. The defendant, represented by Saul Roth, Esq. entered a plea of not guilty. On each subsequent arraignment date, the defendant entered an identical plea. The defendant, in April of 1974, retained new counsel, enlisting John Joseph Sutter, Esq. and Saul Roth, Esq. was relieved on May 8 of that year.

As a result of the additional charges lodged against the defendant, and because of numerous adjournments necessitated by the defendant's health, resolution of these matters took some three years. The records of this Court reflect that at least eleven pretrail conferences were held during that period. The records do not indicate that the defendant or his attorneys made any pretrial applications.

On May 25, 1976, the defendant appeared before the Hon. Paul S. Lawrence, then serving as an Acting County Court Judge. The People indicated to the Court that the defendant wished to enter a plea of guilty to the charge of Promoting Gambling in the First Degree contained in Indictment #38260 and to one count of Criminal Usury contained in Indictment #41415. The District Attorney felt that the length of the anticipated trial together with the uncertainty of success merited such a bargain. In return for his plea of guilty to two E Felonies, the People agreed to forego prosecution of the remaining ten Felonies and three Misdemeanors as well as a pending District Court matter. Against these considerations, the defendant had to weigh the prospect of being sentenced as a Prior Felony Offender.

The Court advised the defendant of his rights during the proceeding, of the nature of the plea arrangement proposed and of its consequences, with particular atten-

tion to the rights the defendant would be surrendering. The judge further indicated that if he could not sentence the defendant to two concurrent sentences of 1½ to 3 years, the defendant would be afforded an opportunity to withdraw his plea.

Throughout the questioning conducted, the defendant's answers and the statements of his counsel were consistent with the trial judge's conclusion.

"The Court: At this time I am satisfied that the defendant understands the nature of the charges and the nature of the plea and possible consequences of his plea, that he is subjecting himself to possible imprisonment and the defendant has discussed his legal rights with his attorney and understands that he is waiving certain constitutional rights. The defendant has been made no threats or promises, other than those I stated on the record here and his plea is voluntary and of his own free will.

Now, sentencing for many reasons will be put over until July 26th, 1976."

The defendant did not appear on July 26, 1976, although his counsel was present. A bench warrant was issued with execution stayed until August 9, 1976.

On August 9, 1976 the defendant appeared for sentence. Apparently, during the intervening period he had consulted new counsel, for on that date he was accompanied by Marvin Zevin, Esq. of Sutter, Moffatt, Yannelli & Zevin and F. Courts Bouse, Esq.

In response to the Court's inquiry, Mr. Bouse stated that the defendant had consulted with him concerning the advisability of withdrawing his previously entered guilty plea. He further stated that although he was sure the plea arrangements were "good" as far as the defendant was concerned, the defendant's medical condition was such

that incarceration might result in his untimely demise. Based upon the foregoing, new counsel requested an adjournment for the purpose of further reviewing the file. At no time did Mr. Bouse or the defendant question the voluntariness of the defendant's plea or suggest that the defendant was innocent. In fact, no formal request to withdraw the plea was made.

The Court denied the request for an adjournment.

Returning to Mr. Zevin, the Court inquired whether he had anything to say prior to the imposition of sentence. Mr. Zevin informed the Court that he was totally unfamiliar with the facts of the case and, for that reason, declined to comment.

The Court then asked the defendant whether he wshed to be heard. The defendant requested only that he be sentenced to an institution where hospital facilities would be available.

The Court assured the defendant that if he needed medical care it would be made available to him. The Court again asked Mr. Zevin if he wished to be heard on sentence and Mr. Zevin once again declined.

The Court then imposed sentence in accordance with the terms of the plea bargain previously negotiated by the People, the defendant's trial counsel and the defendant.

As noted earlier, the defendant's instant application raises two related issues.

First, the defendant contends that he was denied the effective assistance of counsel guaranteed him by the Constitution of this State and the Fourteenth Amendment of the Constitution of the United States. (N.Y. Const., Art. I, § 6). The defendant argues that the following omissions compel such a conclusion:

1. Trial counsel for the defendant failed to make any pretrial motions contesting the validity of the eaves-

dropping warrants or the conduct of the electronic surveillance conducted pursuant to those warrants, with particular emphasis on the "sealing" requirements of Article 700 of the CPL. (*People* v. *Nicoletti,* 34 N.Y. 2d 249).

2. Trial counsel similarly failed to question the legality of the use of evidence seized pursuant to the search warrant utilized in this investigation.

The defendant's present counsel argues that discovery *might* have resulted in information which *might* have led to a successful motion to suppress the introduction of illegally obtained evidence which *might* have resulted in the dismissal of the indictments against the defendant. Counsel argues that the defendant's trial attorneys clearly erred in permitting the defendant to enter a plea of guilty to a felony without making applications to the Court for discovery and suppression of evidence.

Counsel on this motion also contends that the trial court erred in failing to grant the defendant's motion to adjourn the proceedings at time of sentence to permit newly retained counsel to move to vacate the guilty plea entered by the defendant. Although the defendant's third argument addresses itself only to the wisdom of the Court's decision not to grant an adjournment, it must also be considered an aspect of his right to counsel argument, in view of the unfamiliarity of both of his attorneys with the conduct of his case at the time of sentence.

First, it must be understood that any defects or flaws in the authorization or conduct of the electronic surveillance, or any illegality tainting the evidence seized pursuant to the search warrant is irrelevant to this discussion except as it relates to the defendant's argument that he was denied the effective assistance of counsel. Where a defendant pleads guilty, he waives certain rights and evinces, prima facie, an intention to forego appellate review of his con-

viction. (*People* v. *Melton,* 35 N Y 2d 327). Inasmuch as this defendant elected to enter a plea of guilty, he is not now entitled to an order vacating the judgment of conviction solely on the ground that the validity of the search warrant or the conduct of the electronic surveillance might have been questioned at trial. (*People* v. *Brown,* 20 A D 2d 570; *People* v. *Upson,* 20 A D 2d 572).

Similarly, the trial court's decision to deny the defendant's motion to adjourn the sentencing proceedings does not, without more, entitle the defendant to the relief sought. In some instances, a hearing may be required to determine whether such an application is made in good faith and should be granted. (Cf. *People* v. *Pittman,* 50 A D 2d 721; *People* v. *McKennion,* 27 N Y 2d 671). However, the decision to hold such a hearing rests in the discretion of the trial court. (*People* v. *Friedman,* 39 N Y 2d 463; *People* v. *Miller,* 42 N Y 2d 946). The trial judge was fully familiar with the facts and circumstances of this case and presided when the defendant entered his plea. The defendant voluntarily admitted his guilt knowing the consequences of such a plea while assisted by experienced counsel familiar with the facts of the case. Finally, no question was raised by the defendant or either of the attorneys accompanying him at the time of sentence as to the innocence of the defendant. In fact, the only reason advanced for the defendant's change of heart was his dissatisfaction with the sentence he bargained for. Under all the circumstances, it cannot be said that the trial court abused its discretion. Even if the facts compelled such a conclusion, the defendant would not be entitled to relief pursuant to CPL 440.10 because such a claim should have been raised on appeal. (CPL 440.10(2)(c)). (*People* v. *Rodriguez,* 37 A D 2d 962; *People* v. *Landin,* 31 A D 2d 944).

The question remains whether the entire record taken together with the allegations of the defendant, evidences a

denial of the defendant's right to the effective assistance of counsel, and, if so, whether, the defendant is entitled to the relief sought.

A defendant may properly allege that he was denied the effective assistance of counsel in support of a motion to vacate judgment. (*People* v. *Silverman,* 3 N Y 2d 200; *People* v. *Harrigan,* 7 N Y 2d 317). This imposes upon upon the reviewing court a difficult task for several reasons.

First, what amounts to "effective assistance of counsel" is hardly susceptible of definition and varies from case to case. As the Court of Appeals noted in *People* v. *Bennett:*

> "It is impossible to define with any precision what constitutes 'inadequate' or 'ineffective' legal representation or to formulate standards which will apply in all cases." (*People* v. *Bennett,* 29 N Y 2d 462, at 466).

The Court of Appeals has vacated convictions where there has been "a complete lack of investigation or preparation whatever on the only defenses available." (*People* v. *Bennett, supra,* at 467) or the conduct of the defense rendered "the trial" a farce and a mockery of justice." (*People* v. *Brown,* 9 N Y 2d 359; *People* v. *Tomaselli,* 7 N Y 2d 350).

Still, the Court has recognized that "it would be folly for the Courts to sit and hear disappointed prisoners try their lawyers on charges of incompetent representation" (*People* v. *Brown,* supra). Neither should the reviewing Court sit in judgment on every action of trial counsel, even where some are plainly incorrect. Errorless counsel is not required. (*People* v. *LaBree,* 34 N Y 2d 257).

Against this standard must be measured the scanty record available upon a conviction based upon a plea of guilty. The reviewing court is not privy to the hours of negotiation between the People and defense counsel. Nor is it a party to the conferences between defense counsel and the de-

fendant. Further, the Court cannot know how the defendant weighs the uncertainties of trial against the bargain offered by the People. (Cf. *People* v. *Francis,* 38 N Y 2d 150, at 155).

Two final considerations merit the reviewing Court's attention: First, post-conviction distaste with the realities of incarceration is not a rare occurrence. Often, that distaste will extend to the defendant's counsel, whose role in defendant's incarceration may not be viewed by the defendant with impartiality. To vitiate every conviction based upon the entry of a guilty plea because of the defendant's post-conviction dissatisfaction with the performance of his counsel, justified or not, would destroy the delicate integrity of the plea bargaining process. (*P.* v. *Romera,* NYLJ, 2/14/78, p. 16, —— A D 2d ——, (App. Div.2nd Dept.)).

Finally, the reviewing Court must be alert to the fact that granting a motion to vacate judgment long after the defendant's conviction may seriously prejudice the People.

Based upon the foregoing, this Court cannot conclude that the defendant is entitled to the relief sought. Several factors compel this conclusion.

1. The defendant was not untutored in the proceedings resulting in his incarceration, having been involved in plea bargaining arrangements on at least five previous occasions.

2. There is no claim that the defendant was relegated to overburdened assigned counsel not of his selection. The defendant has retained four attorneys to date in this matter.

3. Counsel advising the defendant when the plea was entered was experienced in criminal matters and familiar with the proceedings here.

4. At the time the defendant entered his plea of guilty, he responded to questions from the bench indicating that he was satisfied with the plea bargain negotiated, and with his attorney's efforts on his behalf.

5. Trial counsel spent some three years and was involved in at least eleven conferences of record prior to agreeing to this disposition.

6. The disposition significantly reduced the defendant's exposure to penal sanctions.

7. The defendant received less than the maximum sentence. (P.L. 70.06).

8. Neither the defendant nor any of his attorneys have ever suggested that the defendant was, in fact, innocent.

9. The People would be seriously prejudiced if forced now to try these indictments after the passage of almost five years, since the investigation.

Against those factors, this Court has weighed the two points raised by counsel. First is trial counsel's failure to contest the legality of the People's evidence. The mere fact that trial counsel made no pre-trial motions does not, without more, indicate that the defendant received inadequate assistance of counsel. (*People* v. *Donald R. E.*, 53 AD 2d 780). There is no reason to assume that counsel was unaware of the potential infirmities of the People's evidence, either as a result of his own investigation, or as a result of pre-trial conferences with the prosecution. Indeed before the defendant entered his plea, the District Attorney indicated that the reason for the generous plea offer was the People's recognition that some of the evidence available was questionable. The most that can be said, and

that without assurance, is that defense counsel may have erred in not pressing more vigorously, on the record, for pre-trial disclosure. It cannot be said that any omission on the part of counsel was so glaring as to amount to a denial of the defendant's right to due process.

Similarly, this Court has concluded the defendant's abortive attempt to adjourn the proceedings at time of sentence did not occasion a denial of the effective assistance of counsel. Although it may be argued that the defendant was contemplating a change of counsel, he made no such application to the trial Court. All that the defendant's new counsel sought was an adjournment, to familiarize himself with the case, at a time when the proceedings were for all intents and purposes concluded. All that remained was for the Court to pronounce sentence in accordance with the bargain the defendant had made. Further, new counsel, offered no justification for permitting the defendant to withdraw his plea. Nor could defendant's trial counsel, also present, enlighten the Court.

It can be inferred from the record that the attorney repesenting the defendant's trial counsel, as well as the defendant's new counsel, were somewhat unfamiliar with this matter. But, as noted earlier the trial court's refusal to grant the adjournment to permit new counsel to study the case is not, standing alone, a ground for relief under CPL 440.10. Since the sole purpose of the proceeding was to sentence the defendant in accordance with the terms of the plea bargain, and the trial court fully complied with the terms of the bargain in the presence of two attorneys for the defendant, this Court cannot conclude that the proceedings at time of sentence constituted a denial of the defendant's right to the effective assistance of counsel sufficient to justify an order vacating the defendant's conviction.

Appendix A—Opinion of the County Court—Nassau County.

The comments of the Court of Appeals in *People* v. *Francis,* supra, are appropriate here as well.

> "A plea is a bargain struck by a defendant and a prosecutor who may both be in doubt about the outcome of a trial. (People v. Nixon, 21 N Y 2d 338, supra; People v. Foster, 19 N Y 2d 150; People v. Serrano, 15 N Y 2d 304) . . . In arriving at his bargaining position, a defendant may well calculate not only uncertainties in how a court may view the facts in his case but how it may view the applicability of law as well. On such matters, Judges themselves may often be expected to differ with one another, a factor to which the parties to plea bargaining need not be taken to be oblivious. Where the court which accepts the plea has no reason to believe that the plea is unfair or inappropriate, the bargain becomes final. Unless there was unfairness in its negotiation or acceptance, the fact that a loophole might have been available to defendant is not sufficient grounds upon which to set aside the bargain made. The defendant here has not been shown to have been victimized by inherent unfairness, nor is it evident that the court should have perceived any."
> (*Peopde* v. *Francis,* 38 N Y 2d 150, at 155).

Accordingly, the defendant's application is denied in all respects.

ENTER

HENDERSON W. MORRISON,
JCC

Granted
Dated February 21, 1978
HAROLD W. MCCONNEL
Clerk

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit.

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 79-2062

FRED DE GREGORIO,

Petitioner-Appellant,

v.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent-Appellee.

Before:

HON. STERRY R. WATERMAN, WILFRED FEINBERG, and WILLIAM H. TIMBERS, *Circuit Judges.*

New York, June 18, 1979

Statement made by the court at disposition of appeal in open court.

JUDGE FEINBERG:

You understand that when we dispose of a case in open

court we do so under our local rule because we think the issues are clear and can only be decided one way and it is no reflection on the quality of the advocacy. This is an appeal from an order of the United States District Court for the Eastern District of New York, by Judge Pratt, who was the Judge, which denied appellant's application for a writ of habeas corpus. Appellant had pleaded guilty in the State court to two felony counts charging promoting gambling and usury in violation of New York State law in full satisfaction of six different indictments charging a total of 12 felonies and three misdemeanors. He received a one and a half to three years sentence. He was released from state custody on parole in August, 1978.

Appellant claimed before us on this appeal that he was denied effective assistance of counsel because his lawyer failed to bring a suppression motion to challenge evidence seized pursuant to a search warrant—the probable cause for which was taped conversations made under a state wiretap order. Apparently there was a delay in sealing the tapes which appellant asserts barred use of the tapes for any purpose under the state law, any purpose, thereby vitiating the probable cause for the search warrant. Appellant claims that without the evidence seized pursuant to the search warrant the indictments would have had to be dismissed for insufficient evidence.

We conclude that there was no error by the District Judge in denying appellant's application for a writ of habeas corpus without holding a hearing. Appellant simply was not denied effective assistance of counsel. First, appellant apparently claims only one of his lawyers was ineffective, yet appellant was represented by several lawyers, as many as five at different times, none of whom made the suppression motion that appellant argues should

have been made. Second, while it is true as Judge Pratt pointed out in his opinion that a motion to suppress might have succeeded, it is far from obvious that it would have succeeded certainly. The State may have been able to justify the delay in sealing the tapes, and even if the tapes were rendered inadmissible as evidence in chief by reason of the delay it may be that under state law they could still be used to establish probable cause for the search warrant. Compare, for example, a case in this Court, *United States* v. *Fury,* 554 F.2d 522 at page 532. The decision not to make a suppression motion, therefore, may have been a tactical one. If the motion were made and lost appellant's bargaining power in the plea negotiations would have been substantially undercut. As it was appellant's counsel made what appears to be a very good plea bargain for appellant. Many major charges were dropped. Considering appellant's status as a second felony offender, the sentence he received was light. We think it is clear that on the issue before us appellant was adequately represented and that the proceedings were so far from a farce or mockery of justice that no hearing is required.

We therefore affirm the judgment of the District Court. Thank you, Gentlemen.